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No. 94-280

In the Supreme Court of the United States

OCTOBER TERM, 1994

TED W. GLEAVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner lacked standing to challenge the government's acquisition of certain letters taken from petitioner's lawyer's office during a burglary by a private party.

2. Whether the government's acquisition of the letters violated the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 16 F.3d 1313. The opinion of the district court denying the motion to suppress is reported at 786 F. Supp. 258.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1994. A petition for rehearing was denied on June 3, 1994. The petition for a writ of certiorari was filed on August 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on two counts of bankruptcy fraud, in violation of 18 U.S.C. 152. He was sentenced to 27 months' imprisonment, all but three months of which was suspended. Petitioner was also fined $5,000. The court of appeals reversed petitioner's conviction on one of the counts and affirmed his conviction on the other.

1. In 1982, petitioner and David Knoll, an attorney, went together to Barclays Bank in the Cayman Islands. That trip resulted in the opening of two accounts at Barclays: a personal account in petitioner's name with an opening balance of $9,000 and a corporate account in the name of Atlantis International, Ltd. (Atlantis). Pet. App. A3. Knoll later deposited approximately $600,000 in the Atlantis account. *Id.* at A4. Petitioner was listed as the official signatory on that account. *Ibid.*

At trial, the parties disputed the question of who actually controlled the Cayman Islands accounts. The government introduced evidence that petitioner initiated and maintained the Cayman Islands accounts in order to hide his profits from the sale of gasoline stolen from Ashland Oil. Pet. App. A3. Petitioner and Knoll introduced evidence that Atlantis was Knoll's separate business, that the $600,000 Knoll deposited in that account was money he legitimately obtained from a third party, and that Knoll fully controlled and managed both Cayman Islands accounts. *Id.* at A4.

Several months after the trip to the Cayman Islands, petitioner filed for bankruptcy. In the bankruptcy proceeding, petitioner failed to disclose that he maintained a personal account at Barclays Bank. He also failed to disclose that he had conducted business in

the name of Atlantis. Knoll acted as petitioner's attorney during the bankruptcy proceeding. Pet. App. A4-A5.

Petitioner and Knoll were charged with 46 counts of conspiracy, bankruptcy fraud, money laundering, interstate transportation of money obtained by fraud, and making false declarations to a department of the United States. Pet. App. A6. The jury convicted petitioner on two counts of violating 18 U.S.C. 152: one for concealing his personal account at Barclays and the other for making a false declaration concerning his carrying on business in the name of Atlantis. Pet. App. A4-A5.

2. The government began investigating petitioner and Knoll after obtaining documents stolen from Knoll's law office. The burglary was planned by Timothy Ernle, a federal prison inmate. Ernle hoped to locate evidence against Knoll that he could exchange for favorable treatment on robbery charges he faced. After the burglary was carried out by an accomplice, Ernle sent a sample of the stolen documents to a federal prosecutor. Pet. App. A5-A6.

When the prosecutor advised Ernle that the information he had sent was unhelpful, Ernle sent additional sets of documents. One of those deliveries included copies of two letters addressed to Barclays requesting a transfer of money from the Atlantis account to Knoll's account at another bank. Pet. App. A6, A14; Gov't Suppression Hr'g Exhs. 1A, 1B. Both letters went out under Knoll's letterhead. Exhs. 1A, 1B. One of the letters bears the signatures of both petitioner and Knoll as principals of Atlantis. Pet. App. A14. The copy of the second letter is unsigned. *Ibid.* Information obtained as a result of those two letters led to the indictment of petitioner and Knoll. *Id.* at A6.

3. The district court denied a motion to suppress the letters. The court found that the search of Knoll's office and the seizure of the two letters had been effected by private individuals not acting as government agents. It therefore concluded that there was no Fourth Amendment violation. *United States* v. *Gleave*, 786 F. Supp. 258, 282-293 (W.D.N.Y 1992).

The district court also held that the two letters were not protected by the attorney-client privilege. *Gleave*, 786 F. Supp. at 291-293. The court reasoned that the letters did not involve petitioner's relationship with Knoll as a client, but arose out of their business dealings. *Id.* at 292. The district court also concluded that the letters fell outside the scope of the privilege because they were communications to a third party. *Id.* at 292 n.24.

4. The court of appeals reversed petitioner's conviction for failing to disclose that he had carried on business in the name of Atlantis, because it held that the statute of limitations had expired. The court affirmed petitioner's conviction for failing to disclose his personal Barclays account. Pet. App. A1-A19.

In affirming petitioner's conviction on the latter count, the court rejected petitioner's contention that the government's use of the two letters violated his rights under the Fourth Amendment. The court held that because petitioner did not have a reasonable expectation of privacy in the letters, he lacked standing to object to the government's acquisition of them. Pet. App. A14-A15. The court explained that while a client generally has an expectation of privacy in documents left with his lawyer, *id.* at A14, the letters here were not protected by the attorney-client privilege "because their contents relate purely to business transactions." *Id.* at A15. "More importantly," the court stated, "because [peti-

tioner] sent the letters to an individual with whom he had no relationship of confidentiality [*i.e.*, the officer of Barclays Bank], any legitimate expectation of privacy he may have had in them was abandoned." *Ibid.*

Although holding that petitioner lacked standing, the court considered the validity of the search in connection with the appeal of petitioner's co-defendant Knoll. The court held that the initial search of Knoll's office was a private one and therefore did not implicate the Fourth Amendment. Pet. App. A9-A10. The court remanded, however, for additional findings on whether the government had improperly expanded the scope of the original search by requesting more information from Ernle. *Id.* at A9-A14.

ARGUMENT

1. Petitioner contends (Pet. 11-18) that the court of appeals erred in holding that he lacked standing to challenge the government's acquisition of the letters stolen from his lawyer's office. That contention is without merit.

A party may challenge the constitutionality of a search only when he has a "legitimate expectation of privacy" in the premises or items searched. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978). The court of appeals concluded in this case that a client generally has a reasonable expectation of privacy in confidential documents protected by the attorney-client privilege. Pet. App. A14. The court correctly held, however, that petitioner did not have a reasonable expectation of privacy in the letters at issue here. *Id.* at A14-A15.

Petitioner did not give the letters to his lawyer to obtain legal advice. Cf. *Fisher* v. *United States*, 425 U.S. 391, 402-404 (1976). Rather, they were sent to the

Barclays Bank for a purely commercial purpose—to effect a transfer of money out of the Atlantis account. As the court of appeals held (Pet. App. A15), such purely commercial documents are not protected by the attorney-client privilege. *United States* v. *Davis*, 636 F.2d 1028, 1044 (5th Cir.), (attorney who acts as his client's business advisor or agent "is not acting in a legal capacity, and records of such transactions are not privileged") cert. denied, 454 U.S. 862 (1981); *United States* v. *Rosenstein*, 474 F.2d 705, 714-715 (2d Cir. 1973) (the attorney-client privilege is inapplicable to routine commercial matters when the attorney and client are engaged in business together).

Moreover, as the court below concluded (Pet. App. A14-A15), any expectation of privacy petitioner may have had was compromised once the letters were received by the bank. As this Court held in *United States* v. *Miller*, 425 U.S. 435, 442 (1976), a bank customer does not have a reasonable expectation of privacy in "information voluntarily conveyed to [a] bank[] and exposed to [its] employees in the ordinary course of business."

Petitioner contends (Pet. 12-13) that he had a legitimate expectation of privacy in the entire premises of his lawyer's office. According to petitioner, the situation here is analogous to one in which a person's home is searched. In that context, petitioner notes, a person may object to the seizure of any documents, not just those that contain confidential matters. Petitioner's analogy is unpersuasive. The burglary did not take place in petitioner's business premises; it took place in Knoll's law offices. Petitioner was not an owner, member, or employee of Knoll's law firm. Nor does he claim that he had a right of personal access to Knoll's offices. In those circumstances, petitioner did not have a reasonable

expectation of privacy in the entire premises of Knoll's law offices.

Petitioner contends (Pet. 12-13) that the decision in this case conflicts with the Ninth Circuit's decision in *DeMassa* v. *Nunez*, 770 F.2d 1505 (1985). Contrary to petitioner's contention, *DeMassa* did not hold that a client has a reasonable expectation of privacy in the entire premises of his lawyer's office. *Id.* at 1506-1507. Rather, it held that "the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney." *Id.* at 1506 (emphasis omitted). That holding is consistent with the court's decision here, which recognized that clients generally have a reasonable expectation of privacy in confidential documents protected by the attorney-client privilege, but determined that the particular documents at issue here did not fall within the scope of that privilege. Pet. App. A14-A15.

2. Petitioner next argues (Pet. 19-20.1) that the government's use of the letters violated the Fourth Amendment. Petitioner specifically contends that this Court should reconsider its decision in *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921), which holds that, because the Fourth Amendment is inapplicable to a search conducted by a private citizen not acting as a government agent, the government is free to use information uncovered in such a search. Since the court of appeals properly concluded that petitioner lacked standing to object to the government's acquisition of the letters, however, that issue is not properly presented here.

Moreover, while the court of appeals addressed the validity of the government's acquisition of the letters in connection with Knoll's appeal, it did not finally resolve that issue. Rather, the court remanded for further

findings on whether the private parties who burglarized Knoll's office were acting as government agents when they discovered the letters. Pet. App. A9-A14. Consideration of the validity of the government's use of the letters is therefore "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967).

In any event, there is no reason for this Court to reconsider *Burdeau*. As the Court explained in *United States* v. *Jacobsen*, 466 U.S. 109, 113-115 (1984), the Fourth Amendment "proscrib[es] only governmental actions." It is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *Ibid.* See also *Walter* v. *United States*, 447 U.S. 649, 656-657 (1980) (plurality opinion). Accordingly, when government authorities receive documents obtained through a private search and do not exceed the scope of that search, the Fourth Amendment is not implicated. *Jacobsen*, 466 U.S. at 115-118.

Petitioner contends that *Burdeau* should be narrowed to exclude the use of stolen documents protected by the attorney-client privilege. Pet. 20.1. But the rationale of *Burdeau*—that the Fourth Amendment is not implicated by private action—affords no basis for distinguishing between the private theft of documents protected by the attorney-client privilege and the private theft of all other documents. Even if such a distinction could be drawn, it would not assist petitioner since the letters at issue here were not protected by the attorney-client privilege.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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